

TESTIMONY OF
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BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON INDIAN RESERVATION ROADS

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Thank you, Chairman Campbell, and committee members, for the opportunity to testify today. My name is Loretta Bullard, and I am President of Kawerak, Inc., which is a consortium of 20 federally recognized tribal governments in northwestern Alaska. I am one of Alaska's tribal representatives on the national negotiated rule-making committee on Indian Reservation Roads, and I have attended most of the meetings since they began in March.

I would like to preface my remarks by stating the obvious: the IRR program is badly under-funded, nationally. That is the one funding issue that all tribal representatives to the negotiated rule-making agree upon. My understanding is that the total construction need which the BIA uses to calculate IRR allocations is in the \$6 to \$7 billion dollar range. That means it would take 25 years at current funding levels to even meet today's need.

When TEA-21 increased IRR appropriations, we in Alaska certainly expected an increase of funding. Although Alaska's IRR funding did go up from 1997 to 1998, this was primarily due to BIA's Central Office accepting new construction cost figures for Alaska. Our funding actually went down, substantially, in 1999. IRR funding in TEA-21 did not keep up, on a percentage basis, with the increase enjoyed by the states. Because \$13 million in reservation bridges money was taken out of IRR construction funding and the obligation limitation was applied to IRR funding for the first time, TEA-21 took away much of its own increase to the IRR program. The obligation limitation reduced IRR construction funds by about \$31 million in 1999. Kawerak strongly supports requests made by NCAI, and others, that Congress fund the IRR program at 100%.

The Existing "Relative Need" Formula

My main point today, however, is that the method used by the BIA to distribute IRR funds among the BIA Areas is grossly unfair, and in need of change. The "relative need" formula is illogical, it does not fairly or accurately measure tribal needs, and it is contrary to the authorizing legislation for the program. It effectively excludes the majority of eligible Indian reservations and Alaska Native communities from meaningful participation. The formula reflects a policy decision made by the Bureau in the early 1990's that the highest and best use of IRR funds is to rebuild and rehabilitate existing

BIA-owned roads. It intentionally tracks 80% of funding, every year, to those tribes and BIA regions that had BIA roads constructed in the past.

There are three numeric factors in the formula: 50% of the funding is allocated based on “cost to improve,” which is a measure of construction costs; 30% is allocated by “vehicle miles traveled,” which is a measure of vehicle use of a given road segment; and 20% is allocated by population.

Superficially, that may seem to make sense. However, both the cost to improve and vehicle-miles factors are based on a road inventory which is limited to existing roads the BIA itself owns, or controls the right-of-way for. (There are exceptions for Alaska and for Oklahoma, which I’ll get to in a moment.) But in general, tribes with no BIA roads at all are excluded from 80% of the funding, regardless of their need for new roads or to upgrade tribally-owned roads. In contrast, the law, at Section 101 of Title 23, includes all public roads which serve or provide access to reservations or Alaska Native communities in the definition of Indian Reservation Roads.

To illustrate the problem, imagine two tribes or Native communities of the same size, both of which need access to identical new housing sites 5 miles away from their population centers. Tribe A already has a BIA-owned gravel road that runs past its new housing site. Tribe B has no access road to its site at all. Logically, I suggest that Tribe B has the greatest need for road construction funds, since they have no road at all. However, the BIA’s relative need formula assigns Tribe A funds for its road every year, because the road is in the BIA system. Tribe B, which has no road at all, receives zero from the 80% of the formula driven by inventory. Both tribes will share in the 20% of the formula based on population, but that is all Tribe B receives.

The Bureau has turned the IRR construction program into a deferred maintenance and rebuilding program for its own roads, even though the definition of “Indian Reservation Roads” is much broader. IRR money is not supposed to be maintenance money at all; BIA roads maintenance funding is appropriated separately to the Department of the Interior. The formula simply does not recognize that the BIA’s needs and the needs of tribes are not the same thing. Many reservation tribes have tribally owned roads that are not in the system.

Alaska is treated somewhat differently in the formula than other areas. Congress used appropriations acts in 1993 and 1994 to require that projects in the BIA’s Juneau Area Transportation Plan be counted in the national BIA road inventory for funding purposes. This was later extended by administrative policy. This had the effect of counting about 1000 miles of proposed roads in Alaska in the national inventory. Without this exception, even at TEA-21 funding levels Alaska would only receive \$2 or \$3 million at most. An exception was also made for Oklahoma tribes, to include former reservation roads in the inventory.

Although we greatly appreciate the Alaska exception, it is not a good substitute for having a fair formula to begin with. Juneau has never had the funds to do necessary transportation planning in 227 communities. The Area Plan merely skims the surface, and reflects only the very top priorities of the villages at the time the plan was done. As the members of this Committee know, Alaska's rural villages are starting from almost a zero infrastructure base for ground transportation. Virtually any development we do requires some road construction. We do not have county governments, our local municipal governments where they exist have virtually no tax base, and the state DOT disavows any responsibility for road construction within our villages.

One of the unfortunate side effects of the BIA's system is that true tribal road construction needs are never recorded or requested of Congress, and neither are the true roads maintenance needs for BIA-owned roads. The relative need formula enables the BIA to sidestep its obligation to request adequate maintenance funds for its own roads.

There are other problems with the relative need formula, and its underlying data:

- * Cost-to-improve figures are derived from the BIA's own construction costs, as reported by the Area Offices, which means there is no incentive to be cost efficient. The more the BIA or a tribal contractor spends on a road project, the more funding it will receive in the future.

- * The BIA road inventory system and allocation system is excessively complex. According to information provided at the Neg-reg, each segment of IRR road is supposed to have a data sheet with 55 fields of information filled out by the tribe or the Bureau. This should be redone every year for the inventory to stay current. In theory, once a road is built up to FHWA standards it is supposed to drop from the inventory for funding purposes, but that rarely happens. The inventory was never completed in all areas, and there is enormous variation among the areas in how this information is collected and managed.

Although I cannot speak for other regions, the Bureau in Alaska simply does not have the resources to maintain this complex of a system for 227 tribes.

- * The data system is outmoded and, in my view, unreliable and completely unverifiable by anyone outside the Bureau. When the BIA reported on the system to the Neg-reg this summer, the data was being maintained on antiquated computer equipment that used a Cobol operating system. It was not Y2K compliant. We were told that to verify the data, we would have to physically go to Albuquerque to watch them run the numbers. In this day and age, all of this data should be available electronically and computations should be replicable on any laptop. All they have provided committee members is hard copies.

* The range of projects which are eligible for spending at the local level is much broader than the road inventory which drives funding to the local level. This means tribes or local BIA offices can spend money on projects which are not in the BIA road inventory, and thus prevent their need from going down. In fact, if they build a new road, their funding will go up because that road will eventually be added to the inventory for improvements. I have been told that some reservations have many miles of unimproved dirt or gravel roads that stay in the inventory for funding purposes forever, because the local priority is to never upgrade those particular roads.

* One of the ironies in Alaska is that because of the lack of maintenance funds, the Bureau normally requires the state or a municipality to take the right-of-way and maintenance responsibility of a new BIA road. This means our new roads don't get into the system.

* Another particular Alaska problem has to do with the use of FHWA cost indices. The Bureau applies FHWA cost indices as a corrective factor on cost-to-improve, to correct for inflation or deflation. The index is derived from data provided by the states, and assigns a percentage value for various construction costs in geographic sub-regions. 1987 costs are the base. In 1997, for some reason there was no new FHWA data in Alaska for certain of the key construction cost components, such as gravel and paving. This 1997 FHWA index was used by the Bureau to "correct" the 1999 relative need distribution. Rather than simply revert to the prior year's data, the Bureau applied an arbitrary "default factor" to Alaska's construction costs, which as I understand it was 93% of 1987 costs.

Alaska's relative need share dropped about 33% or \$7 million from 1998 to 1999.

* The funding formula does not fund all the functions that have to be performed. As a practical matter, any tribe which wishes to fully participate in the IRR program has to do transportation planning, develop its inventory, and in general acquire a fairly sophisticated understanding of the program. Tribes with transportation departments are able to access the system much better than those without. These functions are just not funded for small tribes. Although 2% planning funding is available, a BIA Area's 2% funding depends on how much construction money it is receiving.

In Alaska, the per tribe share of 2% money is about \$1,300 – not enough to do much of anything. Some Alaskan tribes spent their entire 1999 2% planning amount sending one person to observe the August Neg-reg meeting in Anchorage. This lack of funding for basic administrative capacity, by itself, effectively locks small tribes out of the program.

I will note in passing that Section 204 of Title 23 imposes some mandatory functions on all Federal Lands Highways programs, such as developing safety and other management systems, which are not funded by the BIA's relative need formula.

* The BIA formula focuses on roads to the exclusion of other uses of IRR funds. At least since TEA-21 was enacted, the IRR program is not just for roads. Transit systems are specifically authorized in Section 204(b). The section in the law which required a new formula to be negotiated for FY 2000 says that the formula is to reflect the “relative needs of the Indian tribes ... for transportation assistance.” It is not just a program for upgrading BIA-owned roads.

As a practical matter, in Alaska many of our ground transportation needs are for relatively small scale projects such as boardwalks, winter trail staking, improved trails or single lane roads. Although we can build some of these kinds of projects, they do not drive funding in the inventory.

Because of the BIA’s funding formula, the majority of tribes in the United States are effectively outside the program. Some of the tribal support staff at the Neg-reg did their own research and estimated that about 350 of the 556 recognized tribes nationally did not receive any IRR construction projects at all during the entire ISTEA authorization period. Some of these tribes may have received planning projects from construction funds, but no construction projects.

This is not a precise count, as it was based on interviews of BIA staff, but I don’t believe it is far wrong. In Alaska alone, about 200 tribes were not served during ISTEA - I doubt that more than 25 or 30 projects were built, and we have 227 tribes. In Kawerak’s region, to the best of our knowledge only 6 of our 20 tribes have ever had an IRR construction project. That is actually a high percentage compared to some other Alaska regions.

The 1999 relative need distribution data provided by the Bureau shows that 155 tribes nationally are allocated “zero” from the cost-to-improve part of the formula, which means that they have no roads in the inventory. These tribes are only attributed funding based on population. Alaska has 55 of these zero inventory tribes. I can assure you that these tribes, or most of them, have very real transportation needs. Sixteen additional Alaskan tribes – including one in Kawerak’s region – are missing from the data altogether. I guess they don’t even rate a zero. Another 70 Alaska tribes are credited with cost-to-improve funds, but not with vehicle miles traveled. Alaska is the only Area in which this occurs.

Another 48 “zero-inventory” tribes are in California, and 18 are in the Portland Area – almost half of Portland’s tribes. Eleven are in the Eastern Area, and others are scattered around the country.

Alaska received \$16.6 million in IRR funds in 1999. It has 227 tribes spread out over a land area 1/5th the size of the Lower 48, a relevant service population of 60,000, and extremely high construction costs. The Billings Area, with 7 tribes, 42,000 people, and – I suspect – much lower construction costs, received just under \$17 million. The lowest relative need share for any Billings Area tribe is \$1.385 million, and only 2 of the 7

Billings tribes receive less than \$2 million. None of Alaska's tribes is attributed even \$1 million, and only one tribe is close to that amount. Four/fifths of Alaska's tribes are attributed less than \$100,000, and there are many whose relative need share is only a few thousands or even hundreds of dollars.

Navajo, by itself, received \$59 million, and several million more in bridge money.

I am not at all suggesting that Navajo or Billings do not have great needs, or that they or any other tribes are over-funded in any absolute sense. The entire IRR program is under-funded. But the distribution is clearly skewed against those tribes which do not already have BIA road infrastructure.

To illustrate the point, one of the minor debates in the formula workgroup at the Neg-reg was whether IRR funds could or should be used for the streets in HUD-funded housing projects. HUD normally funds street construction, but it does not ordinarily fund the access roads to the housing project. Apparently some tribes use IRR funds not only to build the access roads, but to build or reconstruct the streets. In Alaska, IRR funds are not available even for the access roads. These projects are IRR eligible, but there is no funding. New access roads are often needed for our village housing projects, and are built by the local housing authority out of funds that would otherwise be used to build houses. Something is fundamentally wrong with a funding allocation that enables some tribes to fund both kinds of projects with IRR funds, but for other tribes funds neither.

The Negotiated Rule-Making Process

I had thought that the negotiated rule-making would be an opportunity for tribes nationally to develop a new formula, taking into account the needs of the various regions and tribes, and following the criteria set forth in TEA-21. The relative need formula was adopted even before ISTEA, and common sense might suggest that after two transportation acts it would need to be revised. The shift of emphasis toward "transportation assistance" in TEA-21, and the specific criteria listed in the statute such as "relative administrative capacities," geographic isolation, and so forth indicated to the Alaska delegates quite clearly that Congress intended a new formula to be developed.

That is not the Bureau's understanding. To be blunt, the formula part of the negotiated rule-making has broken down. This is largely because of Bureau obstruction to any suggestion of change.

It took the Bureau nine months from the enactment of TEA-21 to even convene the first Neg-reg meeting. Protocols to govern the process were approved by the full committee, including the federal representatives, after the second meeting, but it took three more months for the Interior Department to approve the document. Even then, the authority of the federal negotiators was watered down – the clear message was that any

final work product of the committee would still be subject to multiple layers of review by the agency. There is only one Area Director on the committee, Robert Baraker, and he and Mr. Gishi, the Chief of BIADOT, are the highest ranking BIA officials present. There are at least three Area Road Engineers. Conspicuously absent is the Office of Self-Governance, despite numerous requests by tribes that someone from OSG be appointed to the Committee. OSG staff attend the meetings, but they are not on the committee.

Very early the tone was set that there is little interest in the Neg-reg at the highest policy levels of the Bureau, and even less interest in changing the way the Bureau does business. Assistant Secretary Gover has not attended a single meeting.

Although the negotiations regarding program regulations seem to be going pretty well, the funding formula discussion is going nowhere. Some of the problems, as I see them, are as follows:

- * Not once since the beginning of the Neg-reg have any of the senior BIA officials defined the process as requiring a new formula to be negotiated. The most that the senior BIA officials have said is that the need for a new formula is for the committee to decide. This lack of coherent BIA policy direction leaves the individual BIA representatives on the committee free to oppose any change.

- * No alternatives to the present funding formula have been developed or presented by any Bureau officials, but Bureau delegates on the funding workgroup have vigorously opposed changes suggested by tribal representatives. Bureau staff severely criticized one of the FHWA representatives for merely presenting alternatives to the formula. In my view this is exactly what FHWA and Bureau representatives should be doing if they are going to participate in the formula discussions.

- * The Bureau did not come to the first Neg-reg meetings with any national funding information or the underlying data which drives the formula. Although the Program Management Office did eventually make this material available, tribal representatives had to ask individually for their own copies. Some Bureau representatives in the funding workgroup argued seriously that the workgroup should not even look at funding information or inventory data.

- * Some Bureau Area Engineers in the funding group continually blame the other regions for problems with funding, and assert that all problems can be fixed at the regional level. This is patently untrue – although there are certainly problems within the Areas, any Area only receives the aggregate “relative need” share of its tribes.

- * Some of the tribal representatives are of the belief that if no consensus is reached, the existing formula will continue in effect by default. Bureau representatives have actively encouraged this idea.

That gives some idea of the tone. At one point, at the Anchorage meeting, one of our technical people read to the formula group Senator McCain's floor statement, when he introduced the amendment to TEA-21 that required the Negotiated rule-making. There is little other legislative history to go by. The floor statement said quite plainly that the criteria was borrowed from language used in the NAHASDA legislation, and was to be used by the neg-reg committee to develop a new funding allocation formula. Senator McCain went on to say the amendment "was to ensure that the new funding formula fairly takes into account Indian communities who have not had their roads needs met under previous formulas." This was ignored.

Negotiated rule-making is a consensus-based process, and it is unclear to me how we are to make any progress when some of the representatives won't accept anything other than the status quo. The Bureau itself does not even define the task as negotiating a new formula.

Of course, some of the tribal representatives are also opposed to any change in the formula. No one wants to lose money. Recently, when Congress made \$18.3 million in totally new money available in the FY 2000 appropriation, the small tribes representatives were unable to persuade the funding formula group or the full committee to even recommend, in concept, that the Bureau redirect some of the new money to benefit tribes which have not participated in the program. This was debated for a full week, with several alternative proposals presented, but no consensus was reached. Again, some of the most vigorous opponents to any redirection of funds were Bureau employees.

I don't believe that the few tribal representatives who oppose changing the formula are completely entrenched in their positions. I can't imagine that any new formula would not treat tribes with large populations and land bases well. The real obstacle is the Bureau itself. By and large the Bureau controls the information flow. A tribal representative who is told 1) that no negotiation is necessary, because if an impasse is reached nothing will change, 2) that there is no need to look at funding data or consider the interests of tribes nationally, and 3) that all of the problems are the fault of "other" regions, has very little reason to negotiate.

Recommendations

I have three recommendations.

First, Congress should give the Bureau clear direction that the negotiated rule-making is expected to produce a new funding formula, taking into account the interests of all tribes, and the criteria set forth in TEA-21. Further, if no consensus is reached and the Bureau continues to use the existing "relative need" formula, Congress should be prepared to legislate an allocation method in FY 2001.

Second, there should be a Congressional audit of the BIA's Transportation Program. An independent analysis of the way the Bureau allocates and spends IRR money would, in the long run, help the Bureau, the tribes, and Congress make it a more efficient program, more finely tuned to the needs of Indian people. In my view, the Bureau has misdirected funds that are appropriated to meet the transportation needs of tribes, to meet the needs of the Bureau. Those are not identical interests.

It is not uncommon for particular Areas to fail to obligate all of the limited funding available to them, and for projects to take years and years to be completed. The BIA Transportation Department is the last of the old-time BIA fiefdoms. For other BIA programs, PL 93-638 contracting and in particular self-governance compacting have brought greater accountability, and much more access to information. Tribal contracting of roads projects is still relatively new, and the Bureau simply refused to allow compacting until this year.

One of the more frustrating aspects of dealing with the BIA roads program is that getting clear information can be almost impossible – even our Area Office has difficulty getting information from Central Office. I have pages of correspondence from Juneau to BIADOT requesting, unsuccessfully, a clear explanation of how roads maintenance money is allocated. An audit would bring the light of day to this program.

Third, I believe Congress should seriously consider transferring the entire IRR program to the Federal Highways Administration. This would have to be done carefully to preserve tribal contracting authority. But transportation is the core competency of the FHWA, it is not the Bureau's. I don't make this recommendation lightly. Kawerak gets along very well with the Juneau Area, and I suspect it would be easier for us to negotiate contracts with the Bureau than it would be with a new agency. But nationally, the BIA roads system is a dinosaur which shows no willingness to change.

Thank you, again, for allowing me this opportunity to share my thoughts today. Congress did the right thing when it required negotiated rule-making. I hope that you will continue to exert pressure on the Bureau, or take more direct action, to ensure that IRR funds are fairly distributed and efficiently used.